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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1083

MURRAY COHEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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The Government in its brief in opposition herein has thrice committed a grievous error, the very consistency of which suggests its realization of the violation of petitioner's fundamental rights herein.

At page 5, line 6, again at page 6, line 6 and finally at page 6, footnote 2, line 4, the Government in its brief announces that

> "No exception was taken to the Trial Court's ruling."

with respect to the production of the notes herein.

Such statements are entirely unwarranted as the record shows that the Trial Court allowed exceptions to all rulings on evidentiary matters as well as on motions made during the trial (R. 164, fol. 492).

The statement at page 6 of the Government's brief in opposition reading

> "Even if the notes did reveal that 'hernia' was mentioned, they could not, moreover, have substantially aided petitioner's defense."

is amply answered in the language of Mr. Justice Frank (*United States* v. *Ebeling*, 146 F. (2d) 254 at 259) where he states:

> "We cannot, of course, know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U. S. C. A. Sec. 391."

With respect to that part of footnote 2, page 6 of the brief in opposition reading

> "* * * and (petitioner) had failed to have the notes included in the record certified to the Circuit Court of Appeals." (Parenthesis ours.)

it is respectfully submitted that the notes in the instant case were never produced in the Trial Court at any time. The objection of the United States attorney to their production which was sustained by the Trial Court precluded their being included in the record.

In the *Krulewitch*, *Cohen* and *Ebeling* cases cited in the main brief, the notes were in each instance produced in Court and examined by the Trial Court. In the instant case, however, the notes were not produced in Court, and were not examined by the Trial Court at any time.

With respect to what transpired upon the oral argument in the Circuit Court of Appeals in this case, as mentioned in

footnote 2, page 7 of the Government's brief, it is the petitioner's contention that at no time did he recede from his position as stated in his Reply Brief filed in that Court *viz.*, that the notes should not be considered in the Circuit Court, since they were not a part of the record.

In such Reply Brief filed in the Circuit Court petitioner cited (*Edwards* v. *United States,* 312 U. S. 473, 481) as authority for the position that the notes could not be considered in the Circuit Court of Appeals as they had not been properly identified and were not a part of the record. No statement of counsel upon oral argument which is not part of the record herein can alter the position taken by the petitioner in his brief in the Circuit Court herein. The fact that counsel did not orally object to the examination by one of the Circuit Court judges of evidence not in the record, is not to be considered a consent to such examination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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